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October 28, 2009

VIA EMAIL AND FEDERAL EXPRESS

Stephen Daniels
Clerk of the Board
Civilian Board of Contract Appeals
6th Floor, 1800 M St., NW
Washington, D.C. 20036

Mark Debosier
Deputy Director
Governor's Office of Homeland Security
and Emergency Preparedness
7667 Independence Blvd.
Baton Rouge, Louisiana 70806

FEMA, Region VI
ATTN: Gary Jones
Acting Regional Administrator
800 N. Loop 288
Denton, Texas 76209

RE: St. Tammany Parish's Submission to Arbitration--
PW #18044 (Coin du Lestin Canals).

Dear Gentlemen:

Please let this serve as St. Tammany Parish's (the "Parish") submission to arbitration of the appeal of the Federal Emergency Management Agency's ("FEMA") issuance and obligation of Project Worksheet ("PW") #18044 for 0 dollars pertaining to the Coin du Lestin Canals (herein after sometimes referred to as "Canals"). See, copy of PW #18044, attached as Attachment "1." An initial appeal of PW#18044 was filed timely by the Parish on August 4, 2008. See attached Attachment "2", EXB B. That appeal was denied by FEMA by decision dated January 15, 2009. See attached Attachment "2", EXH A. A second appeal is currently pending in this matter and is being concurrently withdrawn. A copy of the second appeal is attached as Attachment "2" and a copy of

the correspondence withdrawing the second appeal is attached as Attachment "3". The amount in dispute under PW #18044 exceeds the \$500,000.00 threshold set forth in 44 CFR § 206.209.

PW #18044 was obligated on June 6, 2008. Since that time supplemental information has been provided by the Parish to FEMA for its consideration regarding this PW. By letter dated July 3, 2008, the Parish provided the following information and technical data to FEMA:

- Results of Survey and Core Borings from WINK Engineering on Coin du Lestin Canals;
- Affidavits of Shannon Davis, Bruce Parker, and Dan Zechenelly regarding maintenance history of the Canals; and
- Hydrology Report of Dr. Donald Barbe.

By letter dated January 7, 2008, James Stark, Director LRTO, FEMA, stated that FEMA would not fund removal of additional debris from the Canals. See, Attachment "2", EXH B, 2. This correspondence provides that FEMA would consider additional information when submitted by the Parish. Specifically, FEMA would consider surveys of the Canal bottoms and evidence of maintenance of the Canals by the Parish. This is also reflected in PW #18044. See, Attachment "1." FEMA has not considered the information provided by the Parish. Such failure to consider the very information requested by FEMA is arbitrary and capricious.

A. Factual Background

On the morning of August 29, 2005, Hurricane Katrina hit the New Orleans metropolitan area. Prior to the Hurricane making landfall, President George W. Bush declared a State of Emergency in Louisiana.¹ The declaration required FEMA to provide assistance under the Stafford Act. The declaration to provide aid under the Stafford Act to the State of Louisiana includes the removal of debris. With respect to debris removal on private land, FEMA issued a specific policy in response to Hurricane Katrina. Memorandum to Joint Field Offices from Nancy Ward, Director, Recovery Area Command, FEMA, dated September 10, 2005, specifically states that " a determination has been made that it is in the public interest to remove debris from private property because an immediate threat to public health and safety exists . . . in "Louisiana-Parishes of... St. Tammany. . . ." See, Memorandum attached as Attachment "2", EXH B, Exh 3. This Memorandum issued by FEMA clarified the procedures to be followed by joint field offices for application of Recovery Policy 9523.13. FEMA Recovery Policy number 9523.13, attached as Attachment "2", EXH B, 4, states that eligible debris includes silt, mud and other vegetative material. Despite these policy directives, FEMA has failed to remove silt and vegetative debris from the Coin du Lestin Canals.

¹The Parish President, Kevin Davis, declared a State of Emergency by Executive Order, dated August 27, 2005, and the Order has been renewed continuously every thirty (30) days, as per law since that date.

The Coin du Lestin community (which is in the eastern part of the Parish) contains approximately 250 residential homes and is served by a comprehensive above ground drainage system consisting of drainage ditches, drains and culverts which all drain into Canals abutting the homeowners' property. The Canals were navigable prior to Hurricane Katrina and reached a depth of approximately ten feet. At this time, the Canals are full of silt, mud, and vegetative material deposited in them due to Hurricane Katrina when marsh was sheared off of the Big Branch National Wildlife Refuge area filling the Coin du Lestin subdivision, homes, roads, drainage ditches, culverts and Canals.

Importantly, FEMA has authorized and paid for the removal of marsh grass and silt from private homesites, roads, ditches and culverts in Coin du Lestin and throughout the Parish.² It refuses, however, to clear the same debris from these Canals. Thus, Hurricane debris continues to clog the Coin du Lestin Canals creating an imminent threat to the residents and their property.

1. Project Worksheet #2981

FEMA has provided funding for the removal of debris on public and private property, including waterways, in the Parish through Project Worksheets ("PWs"). A PW was issued by FEMA, # 2981, on February 6, 2006 regarding the removal of debris from the Coin du Lestin Canals in the Parish. See, Attachment "2", EXH B, 5. The PW damage description indicates that:

... on August 29, 2005 high winds and storm surge associated with Hurricane Katrina caused an estimated 130 cubic yards of (C&D)(construction debris) and one recreational boat to be deposited in the St. Tammany Coin du Lestin canals. The canals served as access to the surrounding area and are within close proximity to parish residents, therefore, the debris is considered an immediate threat to public health and safety. (emphasis added)

The scope of work indicated by PW #2981 notes that:

FEMA debris specialist have determined that approximately 130 cubic yards of C&D debris and one recreational boat will need to be removed and disposed of from the Coin du Lestin Canals. Estimates were determined from field observations of photographs taken from the assessment... **marsh grass removal from the canals considered**

not eligible as removal is considered to be dredging. (emphasis

²Grand Lagoon (PW #2983), Highway 11 (PW #2984), Highway 433 (PW #2986), Eden Isles (PW #2990), Lakeshore (PW # 3100), various canals (PW #6785), River Oaks (PW #14066), West Pearl (PW #14921), Coin du Lestin marsh grass removal (PW #2914), and Coin du Lestin debris removal (PW #2981). Attachment "4".

added)

The PW was estimated at a total cost of \$7,350.00. The funding for PW #2981 was subsequently increased to \$24,629 by FEMA due to increased costs for accessing the debris in the Canals. This amendment to the PW was written. See, PW #2981 (v1), attached as Attachment "2", EXH B, 6, dated March 6, 2007.

After PW #2981 and 2981 (v1) were issued, FEMA notified the Parish that it would approve dredging of marsh grass from the canals in a 2 foot deep by 10 foot wide area to be taken out of the center of the waterways. See, email of Patrick Ruland, FEMA, Attachment "2", EXH B, 7. A version to PW #2981 to reflect this work was never issued. The Parish filed an appeal of PW #2981 on June 26, 2007, which was never disposed of by FEMA. See, Attachment "4", appeal of PW#2981 with exhibits.

2. Project Worksheet #18044

FEMA issued PW #18044 on January 29, 2008, stating that it was not authorizing funding for any additional debris removal from Coin du Lestin. See, copy of PW #18044, attached as Exhibit "1." The PW states:

DAMAGE DESCRIPTION AND DIMENSIONS

On 8/29/05, Hurricane Katrina created a 10-12 ft. storm surge that inundated the recreational canal system at the Coin du Lestin (CDL) Homeowners Association in St. Tammany Parish, Louisiana. The applicant states that the storm deposited large quantities of silt, sediment and marsh grass throughout CDL's 3.1 mile system and that this constitutes a threat to public health & safety from a 5 yr flood event. The Parish is requesting Public Assistance funding to cover the cost of removal and disposal of the silt, sediment and marsh grass...

WORK TO BE COMPLETED

None. Applicant has not provided proof of: pre-storm condition, prior maintenance, quantifiable storm related damage, or immediate threat to public health & safety. Charges as presented are considered ineligible under the Public Assistance Program. The applicant is encouraged to produce documentation to support their claim.

FEMA concludes in the PW #18044 Narrative that:

Owing to the lack of evidence identifying the eligible storm debris, this Project has been determined as ineligible under the PA Program.

The Parish at this time has provided to FEMA all requested documentation to establish prestorm condition, prior maintenance, quantifiable storm related damage and immediate threat to public health and safety. See, Attachment "2", EXH B, 9, 10, 11 and 14. Thus, FEMA's conclusion in PW#18044 was premature particularly since FEMA knew that the Canals were being surveyed by the Parish's contractor on the suggestion of James Stark. FEMA's failure to consider the evidence of pre-storm condition, history of maintenance and quantification of debris is arbitrary and capricious.

B. Coin du Lestin Canals

The Coin du Lestin Canals are part of the drainage system for the Coin du Lestin Subdivision and they serve as a major source of natural drainage for the surrounding area of the Parish. The Canals drain into Bayou Bonfouca which ultimately drains into Bayou Liberty and Lake Pontchartrain. The Canals are maintained by the Parish and have been so since the establishment of the various phases of the Coin du Lestin Subdivision.

By statute, the Parish has authority and responsibility for the drainage systems throughout the Parish. LSA-R.S. 33:1236. FEMA has recognized the Parish's authority over the drainage systems. See, Exhibit "1." Additionally, the Coin du Lestin Canals have been systematically maintained by the Parish since the establishment of the Subdivision. The last phase of the Coin du Lestin Subdivision (the Peninsula) was developed in the 1990's. When complete its canals were turned over by the developer via Parish Ordinance to the Parish's Maintenance System. See, Resolution Police Jury Series No. 98-8975, dated December 17, 1998, attached as Attachment "2", EXH B, 8.³ All of the Canals are maintained by the Parish's Department of Public Works. This is established by the Affidavit of the Director of the Department of Public Works, Shannon Davis. See, Attachment "2", EXH B, Exh 9.

In addition, Bruce Parker and Dan Zechenelly have also provided affidavits to the effect that all canals within Coin du Lestin are maintained by the Parish and have been so for at least 26 years, in addition to the work done to maintain the drainage ditches and culverts in the area which drain into the canals. See, Attachment "2", EXH B, 10 and 11, respectively.

As reflected in the Affidavit of Shannon Davis, the maintenance efforts of the Parish include:

³Due to changes in governance and development of the Parish over the years, the process for turning over responsibility for drainage evolved. Earlier phases of the Subdivision were complete and turned over to the Parish as part of the drainage system without any formal Parish Ordinance. The Peninsula was completed after a formal process for adopting new developments into the Parish maintenance system had been put into effect. The Parish has been unable to locate Ordinances for the first phases of the Subdivision being turned over to Parish maintenance, but has located an Ordinance for the Peninsula phase. See, Attachment "2", EXH B, 8.

3. The employees within the Department of Public Works under his supervision and direction inspect the drainage ditches, culverts and canals in the Coin du Lestin Subdivision at least monthly. Further, this policy of inspecting the ditches, culverts and canals has been in place at all times during his tenure as Director of Public Works for St. Tammany Parish;

4. That in addition to monthly inspections of drainage ditches, culverts and canals, the Department of Public Works is responsible for clearing any debris found within the drainage ditches, culverts and canals. At all times during his tenure as Director of Public Works, the drainage ditches, culverts and canals at Coin du Lestin were kept clear of debris and maintained by Public Works employees under his supervision and direction;

5. That in further addition, at all times during his tenure as Director of Public Works for the Parish, his employees were also called upon to respond to any reports or complaints of debris or other obstructions to the drainage ditches, culverts and canals in the Coin du Lestin Subdivision;

6. That the Department of Public Works utilizes equipment, including track hoes to remove large obstructive debris from canals at Coin du Lestin on a regular basis. This type of activity has always been done on an "as needed" basis such as obstructions were identified or reported;

See, Attachment "2", EXH B, 9.

At a meeting on July 7, 2008 with James Stark and Eddie Williams of FEMA, Mr. Stark informed the President of the Parish, Kevin Davis, that the Affidavits provided to them establish that the Parish has consistently maintained the Canals.

C. Eligible Debris

The debris deposited in the Coin du Lestin Canals came directly from Big Branch National Wildlife Refuge as a result of Hurricane Katrina storm surge which sheared off large portions of the Refuge and surrounding marsh lands and deposited the debris in the Canals. See, aerial photos of the Canals, attached as Attachment "2", EXH B, 12. FEMA has already formally recognized the existence of eligible debris in the Canals. See, PW #2981, attached as Attachment "2", EXH B, 5; also, Declaration of Eddie Williams, Attachment "2", EXH B, 13.

The data from the WINK survey work establishes that there are as little as 65,000 cubic yards of marsh grass which were deposited in the Coin du Lestin Canals as a result of Hurricane Katrina. See, attached WINK survey data, Attachment "2", EXH B, 14.⁴ The data was used to prepare cross

⁴FEMA has written a PW for removal of identical debris from canals in Plaquemines Parish for \$22MM. The PW is written based on cross sections to establish pre-storm waterway bottoms derived from

sections of the Canals and a representation of the pre-Katrina Canal bottoms.⁵

Additionally, in its Motion to Dismiss in response to the Parish's Complaint filed in the matter STP v. FEMA⁶, FEMA attached the statement of Eddie Williams which provided that eligible debris exists in the Canals and that FEMA is considering another revision to PW #2981 in order to address the threat of flooding. See, Declaration of Eddie Williams, Attachment "2", EXH B, 13.

D. Canals Cannot Withstand Five Year Storm Event

The Parish had its hydrologist, Dr. Donald Barbe, review the Canals and the WINK survey data, cross-sections and results of core borings. Dr. Barbe is a pre-eminent expert in this field who has performed work for FEMA contractors on other projects and who has in recent years performed an in-depth study of the watershed in this area of the Parish. See, copy of Dr. Barbe's Curriculum Vitae, Attachment "2", EXH B, 15. His investigation shows that the Coin du Lestin canals provide drainage for not only the subdivision but for the entire area. See, copy of Dr. Barbe's Report,

surveying and core borings performed in Plaquemines by the same method used by WINK at Coin du Lestin. See, Attachment "5".

⁵ Additional information was assembled which enabled WINK to calculate a pre-storm navigable bottom. This calculation provides for 99,000 cubic yards of debris to be removed in order for the Canals to be at pre-storm navigable condition.

⁶Civil Action No. 07-3469, Sect. S Mag.1, styled, *St. Tammany Parish v. Federal Emergency Management Agency and Department of Homeland Security*.

attached as Attachment "2", EXH B, 16. Further, due to marsh grass and silt deposited in the canals, they cannot withstand a five year storm event.⁷ A five year storm event at this time would cause flooding of roadways and damage to improved property. Thus, an imminent threat to the health, safety and property of the residents of Coin du Lestin exists.⁸

Dr. Barbe's analysis further shows that removal of the debris (identified by WINK's survey and core borings) will allow the Canals to drain adequately in order to withstand a five year storm event. See, Attachment "2", EXH B, 16. Conversely, the continued presence of the storm debris inhibits drainage and will increase the amount of flooding from a five year event. See, FEMA Public Assistance Guide, FEMA 322/June 2007, p. 66.

E. Survey Data Provides Pre-Storm Canal Bottoms

In addition to the 99,000 cubic yards of debris identified by WINK as remaining in the Coin du Lestin Canals, data compiled from inspection of grounded vessels shows that the pre-storm navigable bottoms of the Canals is even deeper. In addition, evidence was collected as to grounded vessels no longer able to move through the canals due to debris. Fourteen vessels were photographed and their owners interviewed. See, Attachment "2", EXH C. This information was used to calculate pre-storm navigable cross sections. The amount of marsh grass and silt which must be removed to return the Canals to the pre-storm navigable state is 99,000 cubic yards.

F. Conclusion

- FEMA has consistently recognized the Parish's authority and responsibility for drainage in Coin du Lestin. This is not an issue.
- The pre-storm condition of these Canals has been established via survey and core borings, resulting in cross sections of the Canals and quantification of debris.

⁷FEMA has previously produced a report of a hydrologist, Tom Schultz, to justify their determination that there is no imminent threat of flooding. That report is attached to PW #18044. Dr. Barbe thoroughly examined the report of Mr. Schultz and refutes his methodology and conclusion. See, Attachment "2", EXH B, 17.

⁸Additionally, already one death has been reported as attributable to the marsh grass deposited in these canals since Katrina. See, Times-Picayune article, Attachment "2", EXH B, 18.

- Maintenance of these Canals has been established via sworn affidavits of Public Works personnel.
- An immediate threat to public health and safety is shown by the expert report of Dr. Donald Barbe whose investigation shows that these Canals will flood, or flooding will be worse due to the debris, in a five year storm event. Additionally, at least one death has been reported as being attributable to the marsh grass deposited in these Canals since Hurricane Katrina.

Based on this supplemental evidence, FEMA should issue a version to PW #18044 for the Coin du Lestin Canals to authorize funding of removal of 99,000 cubic yards of debris. The Parish asserts that it is entitled to funding for removal of this debris under Category A Emergency Work authorized by the Stafford Act. Alternatively, funding for removal of this debris is authorized under Category B of the Act as a permanent project. FEMA has estimated the cost of this work to be \$6,820,000.00.¹⁰ The Parish requests a version to PW#18044 obligating the full amount necessary to clear the Canals.¹¹ In addition, the Parish requests reimbursement for all project management costs expended to date in the amount of \$115,000.00. See, Attachment "8".

¹⁰The removal of this debris from the Canals is currently being advertised as a hydraulic dredging project via public bid. All debris will be removed and the Canals returned to pre-storm condition with the debris deposited at nearby Big Branch National Wildlife Refuge to restore the marsh. This project has received permits from all agencies, including, U.S. Army Corp of Engineers and the U.S. Fish and Wildlife Service which has jurisdiction over the Refuge. See, Attachment "6".

¹¹ Alternatively, the Parish suggests that a new PW be written reflecting the scope of work identified in the project being bid by the Parish at this time which is estimated to cost 75% less than the work set forth in the scope of PW#18044. See, bid documents for Coin du Lestin Project, Attachment "7".

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Yours very truly,

A handwritten signature in black ink, appearing to read "Kevin C. Davis", with a stylized flourish at the end.

KEVIN C. DAVIS
President, St. Tammany Parish